

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

TAREAUN D. GRIFFIN v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-B-1279 Cheryl Blackburn, Judge

No. M2008-01681-CCA-R3-PC - Filed November 6, 2009

A Davidson County jury convicted the Petitioner, Tareaun D. Griffin, of especially aggravated robbery and attempted second degree murder, and the trial court sentenced him to thirty-one years in the Tennessee Department of Correction. The Petitioner appealed his convictions, and this Court affirmed the convictions and sentence in *State v. Bobby W. Jenkins and Tareaun D. Griffin*, No. M2005-00593-CCA-R3-CD, 2006 WL 618303, at *1 (Tenn. Crim. App., at Nashville, Mar. 13, 2006), *perm. app. denied* (Tenn. Aug. 28, 2006). The Petitioner filed a petition for post-conviction relief, amended by appointed counsel, that alleged that he received the ineffective assistance of counsel. The post-conviction court dismissed the petition, and, after a thorough review of the record and applicable authorities, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jeremy W. Parham, Nashville, Tennessee, for the Appellant, Tareaun D. Griffin.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

In our opinion on the Petitioner's appeal, we recited the facts underlying his convictions as follows:

The convictions and sentences at issue in this appeal stem from a December 2002 armed robbery of a discount tobacco store in Nashville. Both Defendants accosted a store clerk with handguns and robbed him of the money in the store cash registers and several cartons of cigarettes. Upon exiting the store, Defendant Griffin fired several shots at the store clerk, hitting him once in the arm. Before he was transported to the hospital, the store clerk was able to give the police a description of his assailants, and the two Defendants were apprehended only a few hours after the robbery. Ultimately, Defendant Griffin was indicted on two charges in connection with the December 2002 robbery and shooting: especially aggravated robbery and attempted first degree murder. FN1 At trial, Defendant Jenkins faced the single offense of especially aggravated robbery.

FN1. Defendant Griffin was initially charged in a twenty-two count indictment handed down by a Davidson County grand jury in January of 2003. A superceding twenty-three count indictment against Defendant Griffin and Defendant Jenkins was issued in June of 2003, of which counts one and two, charging especially aggravated robbery and attempted first degree murder, pertained to the December 2002 robbery. In February of 2004, Defendant Griffin's motion for a severance was granted and, accordingly, at trial he faced only the first two charges contained in the June 2003 indictment.

....

Defendants Griffin and Jenkins were tried jointly in November of 2004. At this trial, Hashem Al-Zayadi, the victim, testified that he was the owner of the In and Out Discount Tobacco store in Nashville at the time of the robbery. Mr. Al-Zayadi was working at his store the evening of December 11, 2002, when he saw Defendant Jenkins enter his store, look around, and then leave two or three minutes later. A half-hour later, Defendant Jenkins returned along with Defendant Griffin. Mr. Al-Zayadi left his counter, walked out to the sales floor and offered to assist the two men. The Defendants declined assistance, stating they were "just looking." Mr. Al-Zayadi described what happened next as follows: "The time I turn my back to try and go back to the cash register, all I see, both of them, they pull a gun." Mr. Al-Zayadi testified that one of the Defendants held a gun to his back and the other held a gun to his head while they forced him back to the store's two cash registers, where they both demanded he open them. After complying, Defendant Jenkins took the money from the first register, and Defendant Griffin took money from the second. Defendant Jenkins then demanded Newport cigarettes and took several cartons.

Mr. Al-Zayadi explained that after obtaining the money and cigarettes, the two robbers started to leave, but Defendant Griffin returned and forced him to

open the second cash register again to check under the tray for more money. Defendant Griffin took the additional money, but as he did, he observed Mr. Al-Zayadi press the button for the silent alarm. Mr. Al-Zayadi testified that at this point Defendant Griffin shot at him, the bullet passing by his head. Mr. Al-Zayadi then grabbed a handgun he kept under his sales counter, but as he did Defendant Griffin fired again, this time hitting him in the arm and causing the one shot Mr. Al-Zayadi fired in the altercation to go into the ceiling. Mr. Al-Zayadi stated that after being shot he fell to the floor, and Defendant Griffin shot at him several more times, just missing him.

As the robbers ran away, Mr. Al-Zayadi walked outside and observed the get-away vehicle, which he described as a red Nissan Maxima with tinted windows and no tags. A bystander saw the injured victim and called 911. The police arrived in less than five minutes. Mr. Al-Zayadi gave the police a description of the robbers before being transported to Vanderbilt Hospital. Mr. Al-Zayadi further testified that the same night, while he was still at the hospital, the police came to his room and asked him to look at two individuals. Mr. Al-Zayadi stated that he identified both men at this police show-up as his assailants, and there was no uncertainty in his identification.

On cross-examination, Mr. Al-Zayadi stated that he was only four to five feet from Defendant Griffin when Griffin fired the first shot. He further stated that he found two more bullets in his store a month after the police had completed processing the crime scene. Mr. Al-Zayadi also admitted that Defendant Jenkins had already left the store when the shooting started.

Officer Donald Barnes of the Nashville Police Department testified that on the night of the robbery he received a call from dispatch at 8:08 p.m. and arrived at Mr. Al-Zayadi's store within five minutes of receiving the call. Upon arriving at the crime scene, the victim informed Officer Barnes that he had been robbed and shot. Officer Barnes observed shell casings and projectiles at the scene. Officer Barnes reported the information he received from the victim to the dispatcher, who issued a police Be On the Look-Out (BOLO) for a dark car, possibly a Nissan Maxima, with a temporary tag and occupied by one white man and one heavy-set black man.

Officer Vincent Archuleta of the Nashville Police Department testified that on the night of the robbery he was in his patrol car when he heard the BOLO and decided to stake-out I-440, which he believed might be a possible escape route for the robbers considering the location of the crime. After waiting for twenty to twenty-five minutes, Officer Archuleta observed a vehicle matching the general description in the BOLO. After calling in his discovery and receiving back-up assistance, Officer Archuleta initiated a traffic stop and took two suspects into custody. Officer Archuleta also stated that he observed, in plain view, two handguns on the floorboard of the car, several cartons of cigarettes, and

a significant amount of cash. After taking the two suspects into custody, Officer Archuleta and a fellow officer transported them to Vanderbilt Hospital, where the suspects were turned over to detectives with the Robbery Division.

Detective Norris Tarkington of the Nashville Police Department Robbery Division testified that he spoke with the victim at the hospital and he appeared to be alert and coherent. Det. Tarkington stated that because it had been only a few hours since the crime, he conducted a show-up identification line-up by bringing the two suspects before the victim one at a time. Det. Tarkington stated that the victim had no hesitation in identifying the two Defendants as his assailants. Det. Tarkington also testified that when he spoke with Defendant Griffin the night of the robbery, Griffin told him that he, and not the store clerk, fired the first shot.

By stipulation, evidence was entered into the record that Officer Earl Hunter, a former crime scene investigator with the Nashville police, took photos of the crime scene and recovered latent fingerprints, two 9mm shell casings, a .25 caliber handgun, one .25 caliber shell casing and three projectiles. Sergeant Danny Orr testified that he processed the car in which the Defendants were apprehended and recovered two handguns, four cartons of Newport cigarettes, and \$680 in cash. Officer Michael Pyburn of the Nashville Police Department, certified by the trial court as an expert in firearm and tool mark identification, testified that the .380 caliber handgun recovered from the car was non-functional due to a missing firing pin and spring. However, the 9mm handgun recovered from the Defendants' vehicle and the .25 caliber handgun recovered at the crime scene were functional. Officer Pyburn further testified that it was his opinion, based on the tool marks, that the 9mm shell casing recovered at the crime scene was fired from the 9mm handgun recovered in the Defendants' car, and two of the projectiles recovered at the crime scene were also fired from this same gun. Officer Pyburn also testified that the .25 caliber shell casing and one projectile from the crime scene were fired by the .25 caliber handgun recovered at the scene.FN4

FN4. While not explicitly stated, it is evident from the record that the .25 caliber handgun recovered at the crime scene is the weapon the victim, Mr. Al-Zayadi, kept under his sales counter and fired during his altercation with Defendant Griffin.

Officer Sally Sherman, an Identity Analyst with the Nashville Police Department, was certified by the court as an expert in latent fingerprint identification. Ms. Sherman testified that the fingerprints recovered at the crime scene matched those of Defendant Jenkins.

Defendant Griffin testified at trial and admitted that he and Defendant Jenkins were at the store the night in question. He further testified that "we went there to rob the man." Defendant Griffin further stated that he was armed with a

9mm handgun, first stating that he had two shells, and later admitting he actually fired more than two shots. Defendant Griffin stated that he saw Mr. Al-Zayadi push the silent alarm button and said aloud that they “better leave.” Then, according to Defendant Griffin, “[b]y the time I got to the door, I heard a shot and I knew the manager had a gun so I pulled my gun out and ducked my head and ran out of the store with the gun in hand.” Defendant Griffin further explained: “I had ducked down real low and was running because I didn’t want to get hit. I just wanted to-I didn’t want to hurt him. I just wanted for him to be scared so he would leave us alone.” Defendant Griffin also testified that he never intended to shoot anyone, and that he had already holstered his weapon when the store clerk began to shoot at him.

On cross-examination, Defendant Griffin again insisted that the store clerk “shot first.” He also admitted that when he talked to detectives the night of the robbery, he lied and said he did not shoot the victim. Additionally, when specifically asked if he abandoned the robbery, Defendant Griffin answered, “No, sir.”

Upon conclusion of the trial, Defendant Griffin was convicted of especially aggravated robbery and attempted second degree murder. Defendant Jenkins was convicted of especially aggravated robbery.

Jenkins and Griffin, 2006 WL 618303, at *1-4 (some footnotes omitted). Based upon this evidence, the jury convicted the Petitioner of especially aggravated robbery and attempted second degree murder. The Defendant appealed, and this Court affirmed the trial court’s judgments. *Id.* at *1.

B. Post-Conviction Hearing

The Petitioner timely filed a petition for post-conviction relief, amended by appointed counsel, in which he alleged relevant to this appeal that his trial counsel was ineffective for: (1) failing to move to suppress the victim’s identification of him at the hospital and at trial; (2) failing to advise the Petitioner about whether he should testify; and (3) failing to effectively communicate with the Petitioner. He alleged that any one of these, or their cumulative effect, entitled him to post-conviction relief.

At the hearing on the petition for post-conviction relief, the following evidence was presented: The Petitioner testified that police took him to the hospital approximately three hours after this shooting. He said that Detective Tarkington had incorrectly testified at trial that he had been taken to the hospital less than two hours after this shooting. The Petitioner asserted that he was pulled over by the police about two hours and thirty minutes after the shooting and he was not taken directly to the hospital. After being pulled over, the Petitioner was required to wait for Detective Tarkington, and he was then transported to the hospital for a “show-up identification.” He estimated that it was at least three hours between the robbery and the identification and said

that he had female witnesses in the car with him who could confirm this fact. The Petitioner testified that, at the hospital, he and Jenkins were taken into the victim's hospital room separately, and he was handcuffed and accompanied by a police officer when he entered the room and remained for "about a second or two." The Petitioner said he asked Counsel to suppress the show-up identification. Counsel never responded to this request.

The Petitioner testified that his trial counsel ("Counsel") represented him for six months and came to see him only once before his trial. The Petitioner said he wrote to Counsel at least three times and called Counsel at least four times asking him to come and see him, but he received no response. The one time that Counsel came to visit him was the Sunday before his trial began on Monday. The meeting, the Petitioner said, lasted five minutes and consisted of Counsel informing the Petitioner that the State's plea agreement offer was still available. The two did not discuss the pros and cons of the Petitioner testifying or the discovery packet given to Counsel by the State. They also did not discuss any possible defense strategies or testimony that they could elicit on the Petitioner's behalf.

The Petitioner said that he testified at his trial because it was "just something that I wanted to do." The Petitioner stated that Counsel never prepared him for his testimony. The Petitioner recalled two specific instances in which he thought his lack of preparation prejudiced him. He said that he was asked if he had abandoned the robbery. He responded "no" because he thought the question meant whether he still had possession of the taken property. He later learned, however, that his answer should have been "yes" because he had already taken the property and was leaving the crime scene when the victim began shooting. The other instance highlighted by the Petitioner was when he was asked about how many bullets he had in his gun. He said that it had been two years since this incident, and he did not immediately recall the answer to this question. If Counsel, however, had prepared him adequately, he could have thought about the answer to this question before testifying and been prepared with a correct response.

The Petitioner testified Counsel never reviewed with him the Petitioner's statements to Detective Tarkington even though he had asked Counsel to do so.

On cross-examination, the Petitioner denied knowing whether his co-defendant's counsel attempted to suppress the show-up identification. The Petitioner said that he did not ever "abandon" the robbery in the sense that he offered to give the property back to the victim, but he had his gun holstered and was leaving when the shooting started. About the bullets, the Petitioner acknowledged that, when he testified at trial, he contradicted his earlier statement to police about how many bullets were in his gun. He conceded that, at trial, he should have testified that he did not recall how many bullets were in his gun rather than attempt to estimate, but he explained he was nervous. The Petitioner agreed he was guilty of especially aggravated robbery, but he said that more interaction with Counsel would have assisted him in defending against the attempted second degree murder charge.

On redirect, the Petitioner testified that he did not learn of the possibility of a self-defense instruction until he went to trial. The Petitioner said that he was not shooting at the

victim when the victim was shot; rather he was ducked down and shooting upward. He said he was shooting only because he had been shot at first. Further, he said that had the show-up identification been suppressed he might not have testified.

Upon questioning by the trial court, the Petitioner agreed that he could only have proven self-defense if he testified on his own behalf. He also agreed that Counsel was his third attorney and came into the case relatively late. He had spoken with his previous attorney, who ceased her representation based on her deployment to Iraq, about many of the things about which he was complaining.

Counsel testified that he represented the Petitioner in this case. He said that the two had discussions in the holding room almost every time the Petitioner came to court. The two discussed the idea of a motion to suppress, but he decided not to pursue such a motion after speaking with co-defendant's counsel. The co-defendant's counsel informed him that he filed a motion to suppress the show-up identification citing the same reasons Counsel intended to cite and that the trial court denied the motion. Counsel testified he informed the Petitioner that co-defendant's counsel had unsuccessfully filed a motion to suppress, so they were not going to file the same motion because it was a waste of time and resources.

Counsel testified that the Petitioner was facing in excess of twenty armed robbery charges for other unrelated robberies. Counsel attempted to negotiate a plea agreement that encompassed all of these charges, but the Petitioner would not accept any of the offers, so the State proceeded to trial on these charges.

Counsel said that, when he began representing the Petitioner, he asked the Petitioner if he was aware what information the discovery response contained. The Petitioner indicated to Counsel that his previous attorneys had briefed him on that.

Counsel testified he and the Petitioner discussed whether the Petitioner should testify. Counsel said he told the Petitioner that the only way that the Petitioner could raise a self-defense argument was by testifying that he did not fire his gun until the victim shot at him. Counsel said, at trial, he had the Petitioner come down from the witness stand and demonstrate how he was kneeled down with his eyes closed when he was firing back at the victim. Counsel asked the trial court to instruct the jury on self-defense, but the trial court declined to do so.

Counsel said he prepared the Petitioner as well as possible for trial. He did not anticipate the question by the State about abandonment. Counsel argued on appeal that, because the Petitioner was leaving the scene of the robbery, he had abandoned the robbery. This Court disagreed, saying that exiting the scene of the robbery was still part of the robbery.

On cross-examination, Counsel testified that he did not review with the Petitioner any additional testimony that could be added to the motion to suppress, such as eyewitnesses who could verify that the show-up identification occurred more than three hours after the robbery. Counsel testified that this was of no consequence because there were police records indicating what time the BOLO for the vehicle involved in this robbery was issued and what time police

stopped the Petitioner in the vehicle. Therefore, these times were fixed and could not successfully be contradicted by witnesses. Counsel said he did not recall how many times he went to see the Petitioner in jail but said that the two had frequent conversations at the Petitioner's set court dates.

Based upon this evidence, the post-conviction court dismissed the Petitioner's petition for post-conviction relief. The post-conviction court's specific findings will be discussed in each relevant section below. It is from the judgment dismissing his petition that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends Counsel was ineffective for: (1) failing to move to suppress the victim's show-up identification and subsequent trial identification of him; (2) failing to adequately advise him about whether he should testify; and (3) failing to adequately communicate with him before trial. Further, he contends that the cumulative effect of these errors entitles him to post-conviction relief.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner]

makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney’s performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney’s perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, “in considering claims of ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel’s representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

A. Motion to Suppress

The Petitioner contends that Counsel was ineffective for failing to file a motion to suppress the victim's show-up identification of him at the hospital. The Petitioner notes that it has long been recognized that show-up identifications are inherently suggestive and unfair to the accused. Further, the Petitioner asserts that the victim's identification occurred three hours after this incident, contrary to the police officer's testimony that it was less than two hours; thus, there was not sufficient proximity between the time of the offense and the confrontation. Finally, he asserts that the show-up identification in this case was impermissibly suggestive in that the Petitioner was brought before the victim in handcuffs. The State counters that the Petitioner failed to establish any grounds for filing a motion to suppress and that he can not show prejudice because co-defendant's counsel unsuccessfully filed a similar motion.

Counsel testified that he did not file a suppression motion because he saw no basis to do so. The post-conviction court found Counsel's testimony credible. The post-conviction court noted that Counsel testified he did not file the motion to suppress because co-defendant's counsel had unsuccessfully filed a motion to suppress the identification and that the time line for the show-up identification was fixed based upon records from police communications. Therefore, the post-conviction court concluded, the Petitioner did not demonstrate how a suppression motion and hearing would have changed the outcome of his case.

We conclude that the evidence does not preponderate against the trial court's findings. Counsel testified that any motion to suppress filed on the Petitioner's behalf would mirror the motion to suppress filed by the Petitioner's co-defendant. The show-up identification of both defendants happened at the same time and in the same manner. On appeal, the Petitioner offers several reasons why the show-up identification by the detectives in this case was improper. These reasons, however, were considered by the trial court when it denied co-defendant's motion to suppress. We recognize that the Petitioner contends that his motion to suppress would have been different in that he could have offered the testimony of witnesses who would have confirmed that there was more than a three hour lapse between the time of the shooting and the show-up identification, which would contradict the detective's testimony. The Petitioner argues that the longer lapse in time would have increased the chances that the show-up identification would have been suppressed as unreliable. The witnesses to which the Petitioner referred, women who were riding in the car with him, were not presented at the post-conviction hearing, and we cannot speculate about what their testimony may have been. Additionally, Counsel testified that the time line was "fixed" in that the police records indicated when the officers responded to the scene and when officers stopped the Petitioner. Those records did not support the Petitioner's version of events. Under these circumstances, we conclude that the Petitioner has not met his burden of showing that Counsel's representation fell below a reasonable standard or that he was prejudiced. He is not, therefore, entitled to relief on this issue.

B. Counsel's Advice to Petitioner About Testifying

The Petitioner next contends that Counsel was ineffective by failing to advise the Petitioner about whether he should testify at trial. The Petitioner asserts that he was subject to repeated attack by the State during cross-examination because Counsel did not adequately prepare him for questioning by the State. At the post-conviction hearing, the Petitioner asserted

that Counsel refused his repeated requests to review the evidence produced during discovery, including his prior statement to detectives, leaving the Petitioner to rely on his memory of events that occurred two years before. The Petitioner also testified that Counsel failed to advise him about the possible pros and cons of his decision to testify. The State counters that Counsel was not deficient and also that the Petitioner has not shown prejudice.

The post-conviction court found:

Petitioner testified that he chose to testify at his trial and that he wanted to testify; however, he stated that trial counsel did not discuss with him the pros and cons of testifying nor did he prepare him to testify. Petitioner pointed out that when the State asked him at trial . . . about abandoning the robbery, Petitioner testified in the negative because he thought the State was inquiring if he left anything behind at the scene. In retrospect, he would have testified that he had abandoned the robbery because after the weapon was fired and he had the money, he was leaving the scene. Petitioner also testified that he had trouble recalling how many bullets were left in the gun when the State cross-examined him at trial. Petitioner alleged that trial counsel never reviewed Petitioner's statements to Detective Tarkington though he had asked him to do so.

When the State cross-examined the Petitioner at the evidentiary hearing and inquired if he would testify differently if he were to testify now, Petitioner agreed that he testified truthfully at trial. He pointed out that his main issue was with the word "abandoned." Petitioner explained that when the robbery was complete, his weapon was holstered, so he would have testified that he continued on and left the scene with the property. During his testimony, Petitioner conceded he was guilty of the aggravated robbery, but his concern was about being convicted of attempted second degree murder.

When the Court questioned Petitioner, the Court pointed out that Petitioner's defense strategy was raising self-defense, which necessitated him testifying on his own behalf. Petitioner conceded that was true. Petitioner also stated that he testified at trial because he wanted to explain his side of the story since several witnesses were saying he shot the victim.

In light of the fact that petitioner was pursuing a self-defense strategy at trial, the Court finds that Petitioner failed to demonstrate how he was prejudiced by testifying on his own behalf at trial. Petitioner indicated he testified truthfully at his trial and conceded his testimony was necessary for a self-defense strategy.

The evidence does not preponderate against the post-conviction court's findings. The Petitioner said that he testified because he wanted to testify. Counsel said that the two did discuss his testimony, and Counsel specifically recalled preparing the Petitioner for testimony about his physical position when he fired back at the victim. This was their attempt to prove a self-defense claim. The Petitioner agreed that his claim of self-defense necessitated his

testifying at trial. The Petitioner's claim that Counsel did not properly prepare him to testify, as the post-conviction court noted, rests primarily upon the fact that he felt unprepared to answer the question about whether he abandoned the robbery and how many bullets were in his gun. In our view, Counsel's failure to anticipate and prepare the Petitioner for these questions by the State did not fall below an objective standard of reasonableness. Further, there is no evidence in the record from which we could conclude that there is a reasonable probability that the results of the trial would have been different had the Petitioner testified that he had abandoned the robbery, or that he knew exactly how many bullets were in his gun. Therefore, the Petitioner has not shown the requisite prejudice. The Petitioner is not entitled to relief on this issue.

C. Adequate Communication

The Petitioner next contends that Counsel failed to effectively communicate with him. The Petitioner asserts that during the two years that he was incarcerated, Counsel met briefly with him only one time in jail, on the eve of trial. The post-conviction court found that Counsel was the Petitioner's third attorney and entered the case after the case had been set for trial. Accordingly, Counsel's limited number of visits was not unusual or deficient. Further, the post-conviction court found that the Petitioner had not demonstrated that the limited number of meetings constituted ineffective assistance of counsel.

We conclude that the evidence does not preponderate against the post-conviction court's findings. Counsel testified that he met with the Petitioner during all of their court dates. He asked the Petitioner if the Petitioner was familiar with the discovery packet, and the Petitioner responded affirmatively. The two discussed a self-defense strategy, and they attempted to execute that strategy through the Petitioner's testimony. This included the Petitioner leaving the witness stand to demonstrate for the jury his position when firing his weapon. The fact that Counsel may have only visited the Petitioner once while the Petitioner was incarcerated does not in itself show that Counsel's representation fell below an objective standard of reasonableness. The Petitioner is not entitled to relief on this issue.

D. Cumulative Error

The Petitioner contends that the cumulative effect of Counsel's errors entitles him to post-conviction relief. Because we conclude that Counsel was not ineffective for any of the specific reasons raised by the Petitioner, we conclude there was no cumulative error. The Petitioner is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the Petitioner is not entitled to post-conviction relief. As such, we affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE